

Posted 11/1/96 2:00 p.m.

Order 96-11-2



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 1st day of November, 1996

Served November 7, 1996

In the matter of

**EXPANDED CARGO TRANSFER FLEXIBILITY
AT ALASKA INTERNATIONAL AIRPORTS**

Docket OST 96-1600

FINAL ORDER

Summary

In this order we are finalizing our tentative findings and conclusions in Order 96-9-19, and granting certain blanket authority to foreign air carriers under 49 U.S.C. 41301 to conduct expanded cargo transfer activities at international airports in the State of Alaska.

Background

By Order 96-9-19, served September 20, 1996, in response to an application filed in this Docket by the State of Alaska, the Anchorage International Airport, and the Fairbanks International Airport (Alaska), we directed interested persons to show cause why we should not grant foreign air carriers which currently hold effective Department authority to engage in scheduled foreign air transportation of cargo (except foreign air carriers of Japan and the United Kingdom) expanded cargo transfer authority at Alaskan points. Specifically, we proposed to grant these carriers exemption authority under 49 U.S.C. 41301 to engage in the following cargo transfer activities at Anchorage and Fairbanks International airports:

1. on-line cargo transfers from one of their own aircraft to any of their other aircraft;
2. all forms of change of gauge for cargo operations, including "starburst" change of gauge;

3. commingling of cargo traffic moving in foreign air transportation with cargo traffic not moving in foreign air transportation;
4. interline cargo transfers to and from U.S. carriers; and
5. interline cargo transfers to and from other foreign carriers.

We also proposed that this authority would apply to any foreign air carriers that receive Department authority to engage in scheduled foreign air transportation of cargo (whether authorizations permitting combination or all-cargo services) during the period this exemption would be in effect. Finally, we stated that our proposed exemption authority would not authorize new point-to-point traffic rights.¹

In reaching our tentative decision in this case, we stated our view that grant of this authority on an industry-wide basis would provide important public benefits to the State of Alaska. We noted that the Department, and the Civil Aeronautics Board before it, have long recognized the critical importance of air services to the economy of Alaska, and have acted to support Alaska's efforts to attract air services to the state. We also noted that, for a variety of operational reasons, there has been a recent decline in services at Alaska's airports, which has had a serious impact on Alaska's ability to develop its airports as transit destinations. We stated our view that the authority we proposed to grant would enable carriers to utilize fully the geographic advantages of Alaska as a cargo hub, would facilitate greater development of international operations at Alaskan airports, and would create new business opportunities for U.S. carriers.

We also stated that this authority should be withheld from foreign air carriers of Japan and the United Kingdom, in view of our engagement in critical, comprehensive efforts with those countries aimed at reaching new, more competitive bilateral aviation agreements, stating that the unilateral grant of such authority to these important trading partners could compromise our ability to achieve our negotiating objectives.

Finally, in response to concerns raised by the State of Hawaii, we stated that we would review any request for comparable relief filed by that state on the basis of its demonstration of the clear bases for the type of treatment we proposed for Alaska.

¹ We stated that the authority would therefore not permit (1) the carriage of traffic from any point in the carrier's homeland to a point in the United States not otherwise authorized from that homeland point, or from any third country point to a point in the United States except as otherwise authorized; (2) code-share operations to U.S. points unless both carriers otherwise held authority between the points involved and the requisite Statement of Authorization; and (3) cabotage operations.

Responsive Pleadings

Responsive pleadings to Order 96-9-19 were filed by the State of Alaska, the Anchorage International Airport, and the Fairbanks International Airport (Alaska); American International Airways, Inc. (AIA); Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Gemini Air Cargo; Japan Air Lines Company, Ltd.; Nippon Cargo Airlines Company, Ltd.; Northwest Airlines, Inc.; and Tower Air, Inc.² These pleadings are summarized in the Attachment to this order.

Decision

We have decided to finalize our tentative findings and conclusions in Order 96-9-19, and to grant the exemption authority we proposed in that order.³ In taking this action, we confirm the conclusions we set forth in our order to show cause concerning the special aviation needs of the State of Alaska, and the benefits that this authority will bring to Alaska and its economy. We also note the statements of AIA, Evergreen, Gemini, and Tower, which support our tentative decision, that this authority will increase U.S. carrier opportunities to conduct interline and subservice operations on behalf of foreign carriers transiting Alaska. In sum, we find that grant of this exemption authority, as limited and conditioned, is consistent with applicable law and with the public interest.

The respondents in this proceeding raise a number of issues, some of which were raised in the answers to Alaska's initial application in this Docket.

One of the concerns was that we have not adequately justified distinguishing between Alaska and other U.S. communities in deciding to confer this authority for Alaskan airports, or limiting the award of authority to cargo operations. We believe that the record, and Department precedent, warrant the action we are taking here. As noted above and in Order 96-9-19, we and the Civil Aeronautics Board have long recognized the special needs of Alaska for air services. We have made similar conclusions with respect to other geographically-isolated parts of the United States, notably Guam and Saipan.⁴ It has been U.S. Government policy, in light of those needs, to take regulatory actions designed to assist those localities in assuring the continuation of air

² AIA, Gemini, and Tower accompanied their responsive pleadings with motions for leave to file late. Good cause having been shown, we will grant these motions.

³ We have modified slightly the operational condition on this authority (footnote 3 in Order 96-9-19; ordering paragraph 2 of this order) to clarify the operations that may be performed under this exemption. We are also clarifying that in proposing to exclude foreign air carriers of the United Kingdom from this authority, we did not intend to exclude foreign air carriers incorporated and having their principal place of business in Hong Kong.

⁴ See, for example, Orders 92-3-37 and 88-12-45.

transportation services, for the well-being of their economies. The action we are taking here is fully consistent with that policy. Furthermore, our limitation of this award to cargo operations reflected nothing more than a recognition that cargo-related authority was the only authority that was requested by Alaska in this proceeding⁵.

Several respondents believe that if we were to grant this type of authority at all, it should be on a case-by-case basis, and that doing so on a blanket basis as we proposed would undermine U.S. negotiating strategy. We do not concur with this assessment⁶. As we stated in Order 96-9-19, Alaska has fully justified the need to proceed on an industry-wide basis and in the most efficient manner possible. Making this authority the subject of individual applications by foreign carriers would severely delay the public interest benefits of the authority to the State of Alaska and would compromise Alaska's ability to develop its planned cargo hub. No party has persuasively demonstrated that the limited authority we are granting here would harm our overall negotiating position with foreign governments, or shown how on balance the public interest would be better served by our acting in a manner other than that proposed.

We also do not concur with the view that our action confers broad new route rights on foreign carriers, and that they may use this transfer authority to gain extensive new access to the U.S. cargo market. The transfer services we are authorizing do represent new operating flexibility for the foreign carriers involved; however, the authority does not allow a foreign carrier to conduct new scheduled services to any additional U.S. points. While the authority will give foreign carriers to which this exemption applies the ability to interline traffic at Alaska with U.S. carriers, destined for any interior U.S. point, all these foreign carriers can already conduct such transfers, interlining traffic to any U.S. point at their existing U.S. gateways. Finally, with respect to the concern of Federal Express that we did not adequately address the issue of Seventh Freedom operations because we did not include Alaska's suggestion that the authorized services be tied to the homeland of affected foreign carriers, we will include in the ordering paragraphs the

⁵ We note, however, that we have previously granted *passenger* stopover authority at Alaska to various foreign air carriers. *See*, for example, Order 81-8-135.

⁶ Nor do we agree with the view that we should limit the grant of this extrabilateral authority to carriers of countries with which we have pro-competitive agreements (as we do extrabilateral "Cities Program" awards), or "Open Skies" agreements. As noted above, the special needs of Alaska, as documented in the record of this proceeding, serve to make such a limitation unwarranted in this instance.

specific language proposed by Alaska in its application, in order to more clearly define the authority at issue in this proceeding.⁷

Concerning Japan and the United Kingdom, these countries represent two of our most important aviation markets, and, as we have stated, critical and comprehensive activities are ongoing in an effort to reach new, more competitive agreements. We continue to believe, as a matter of policy, that it would not be in the public interest to grant this extrabilateral authority to carriers of these countries at this time and at this stage of the efforts. Nor do we believe that our decision to withhold this extrabilateral authority is in any way contrary to our obligations under any agreement with either Japan or the United Kingdom.⁸

Finally, Alaska has asked that we grant this authority for an indefinite duration and commit not to limit or revoke this authority without hearing. One year is the standard duration that, as a matter of policy, we place on extrabilateral exemption awards, so that the Department has the opportunity to review the public interest bases for such awards on a recurring basis. Likewise, it is our standard practice to reserve the right to amend, modify, or revoke any exemption authority, without hearing, so that we can respond quickly to circumstances requiring such action in the public interest. While we do not find that Alaska has shown a reason for us to deviate from our normal practice in this case, at the same time we are not aware at this time of any circumstances that might make such negative action necessary.

In view of the above, we find that grant of the exemption authority described above is consistent with the public interest, and that our action does not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975.

ACCORDINGLY,

1. We grant all foreign air carriers which currently hold, or which may subsequently receive, effective Department authority, except as noted in paragraph (4) below, to engage in scheduled foreign air transportation of cargo (whether under authorizations

⁷ Consistent with Alaska's statements that it seeks the award of no new traffic rights, any authorized operations would be subject to the limitations otherwise applicable for operations to the United States, which would include the requirement that carriage of cargo traffic be only on flights operating to and from the carrier's homeland.

⁸ We recall, however, that we specifically stated in Order 96-9-19 that we would not move to remove Alaska cargo rights already held by carriers of these countries. Furthermore, our decision with regard to the extrabilateral authorities at issue here does not serve to defeat existing bilateral rights. Thus, for example, we recently granted Nippon Cargo Airlines bilaterally-agreed authority by exemption to conduct all-cargo services between Japan and Anchorage (*see* Order 96-10-37, issued October 24, 1996).

permitting combination or all-cargo services), exemption authority under 49 U.S.C. 41301 to engage in the following cargo transfer activities at Anchorage and Fairbanks International Airports: (1) to transfer cargo from any of their aircraft to any of their other aircraft, provided that both aircraft are operating to/from a point in the carrier's homeland; (2) to make changes, at points in Alaska, in the type or number of aircraft used to transport cargo, provided that in the outbound direction the transportation beyond Alaska is a continuation of the transportation from the carrier's homeland to Alaska, and in the inbound direction, the transportation to the carrier's homeland is a continuation of the transportation from behind Alaska; (3) to commingle cargo moving in foreign air transportation with cargo traffic not moving in foreign air transportation; (4) to discharge cargo in Alaska for transfer to a U.S. carrier for onward carriage to a final destination in the United States or in a third country, and to uplift from Alaska cargo transferred from a U.S. carrier which was transported by that carrier to Alaska from a point of origin elsewhere in the United States or in a third country; and (5) to discharge cargo in Alaska for transfer to another foreign carrier for onward carriage to a final destination in a third country, and to uplift from Alaska cargo transferred from another foreign carrier which was transported by that carrier to Alaska from a point of origin in a third country;

2. This authority will not permit (1) the carriage of traffic by a foreign air carrier, in its own name and under its code, from any point in the carrier's homeland to a point in the United States not otherwise authorized by the Department from that homeland point; (2) the carriage of traffic by a foreign air carrier, in its own name and under its code, from any third country point to a point in the United States except as otherwise authorized by the Department; (3) code-share operations to U.S. points unless both carriers otherwise hold Department authority between the points involved and the requisite Statement of Authorization; and (4) cabotage operations;

3. This authority shall be effective on the date of issuance of this order, and shall remain in effect for one year;

4. This authority shall not apply to foreign air carriers of Japan and the United Kingdom (but shall apply to any foreign air carrier incorporated and having its principal place of business in Hong Kong);

5. We grant all motions for leave to file;

6. To the extent not granted, we dismiss all requests for relief in Docket OST-96-1600;

7. Our action is subject to amendment, modification, or revocation, at our discretion and without public hearing, should such action be necessary in the public interest;

8. We will serve this order on all U.S. certificated air carriers and foreign air carriers, and all other parties to this proceeding; and
9. We will publish a summary of this order in the Federal Register.

This constitutes a final order by the Department of Transportation within the meaning of 5 U.S.C. 551(6). We will not entertain petitions for reconsideration of this decision. See 14 CFR §385.54(b).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation and
International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://www.dot.gov/dotinfo/general/orders/aviation.html>.*

Summary of Pleadings in Response to Order 96-9-19

Delta, Federal Express, and Northwest oppose our finalization of Order 96-9-19. They believe that because of the value of the cargo transfer authority at issue here, we should issue such authority only on a case-by-case basis upon receipt of applications from individual foreign air carriers. They believe that a unilateral grant of this authority could undermine our ability to negotiate liberal aviation agreements and generally remove constraints faced by U.S. carriers abroad. Delta states that we should limit such relief to carriers of countries with which we have “Open Skies” bilateral aviation agreements.

Federal Express also states that the description of the proposed authority in Order 96-9-19 is misleading, as it would confer broad new route rights on foreign carriers, subject only to the condition that those rights be used for the transfer of cargo. It states that the proposed authority would give foreign carriers from countries which restrict U.S. carrier operations effective access to the whole U.S. air cargo market, since, under the transfer/interline relief proposed, foreign carriers could move cargo to Alaska which is destined for any point in the United States or for third countries. It states that the interline limitation would have little real impact, since shippers are not concerned whether their cargo moves on a single plane, on-line, or interline basis. Because of these concerns, Federal Express suggests limiting any award of Alaska cargo transfer authority to allowing the transfer, or interlining, only of that traffic which is originating from or destined to points for which the foreign carrier already holds Department authority. Finally, Federal Express expresses concern that because we failed to include Alaska’s suggestion that the authorized services be tied to the homeland of each affected foreign carrier, the authority would include wholly Seventh Freedom operations.

In urging us to grant this authority only on a case-by-case basis, Federal Express states that we should, as we did in granting extrabilateral authority under the “Cities Program,” grant such authority only where there is a pro-competitive agreement in place with the foreign carrier’s homeland. Finally, Federal Express states that we have given no basis to limit such an award to cargo operations or to take an action which benefits one locality over another.

JAL and NCA support Alaska’s initiative and object to what they believe is discriminatory treatment on our part in tentatively deciding to withhold the proposed exemption authority from them. They state that we did not adequately explain our decision to exclude them; that we have other trading partners with which we have more

restrictive relationships than we have with Japan; and that withholding this authority will not further our negotiations with the Government of Japan. NCA states that our proposed action represents a unilateral sanction against Japan; and is inconsistent with non-discrimination provisions of the 1953 Treaty of Friendship, Commerce and Navigation between Japan and the United States and of the 1952 U.S.-Japan Air Transport Agreement.

AIA, Evergreen, Gemini, and Tower support our proposal and state that we should finalize our tentative findings and conclusions in this proceeding. They state that grant of this authority will increase U.S. carrier opportunities to conduct interline and wet-lease operations on behalf of foreign carriers serving Alaska.

Alaska urges that we adopt Order 96-9-19 with changes: first, that we include carriers of Japan and the United Kingdom in the grant of authority, and second, that we make the grant for an indefinite duration. Alaska states that the proposed relief is within the discretion of the Department.

It reiterates the benefits it sees flowing to the Alaskan community from the authority it has requested. It states that while it views our tentative decision as an extremely positive step, the loss of carriers of Japan and the United Kingdom will severely impact the effectiveness of the initiative, without significantly increasing the United States' negotiating leverage with those governments. It states that other countries are actively making plans to set up their own cargo hubs, and that Alaska must be competitive.

Alaska takes issue with the view of Federal Express that the proposed authority involves the grant of broad new route rights. It states that, as described in Order 96-9-19, the authority would be available only to foreign carriers holding authority to serve at least one U.S. gateway; and that such carriers can now interline traffic to any interior U.S. point from that gateway. It states that the proposed authority would only allow the foreign carrier to choose Alaska, rather than its other gateway, for that interline transfer.

Alaska states that action limited to cargo services is warranted, and that the U.S. International Air Transportation Policy Statement of April, 1995, recognizes differences between cargo and passenger services and the need for expanded cargo services. Alaska states that the authority it seeks will not disadvantage any other U.S. locality, and notes that Alaska has a distinctive geographical location and has lost traffic due to operational changes in international air commerce.

Finally, Alaska states that the duration of the proposed authority should be of indefinite duration, since, in view of the capital investment involved in the planned new cargo facilities, it needs assurances that the transfer authority will remain in place for an extended period. To this end, it also believes that we should state that we will take no

action to revoke or limit the proposed authority without affording affected parties the right to a hearing.